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The Religious Dimension Of Judicial Decision Making And The De Facto Disestablishment

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THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING AND THE *DE FACTO* DISESTABLISHMENT

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I. INTRODUCTION

The primary purpose of Steven Smith's provocative article "Legal Discourse and the *De Facto* Disestablishment" is to call attention to what he refers to as a "*de facto* disestablishment of religion" in our legal discourse. He argues that this *de facto* disestablishment "is different than, and much more sweeping in its effects than, the formal disestablishment jurisprudence that is explicitly invoked in judicial opinions and lawyers' briefs."[1] It operates more or less silently beneath the surface of the law and deeply influences legal thinking and judicial decision making. Although the exact boundaries of the *de facto* disestablishment are hard to define, Smith attempts to chart the "geography" of this *de facto* disestablishment in four zones: (1) controversies implicating "core establishment clause prohibitions and the paradigmatic church-state controversies;" (2) controversies not paradigmatically evoking establishment clause issues but involving religion or religious institutions; (3) libertarian legal prohibitions against particular instances of apparently religiously motivated paternalism (*e.g.*, proscriptions on abortion, euthanasia, homosexuality, or obscenity); and (4) the common law or, more broadly, non-constitutional judicial decisions. Moreover, from the perspective of *de facto* disestablishment, he emphasizes that

> religion is not viewed as a resource or a potentially helpful approach to understanding the day-to-day issues of law. So the

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1. Steven D. Smith, *Legal Discourse and The* De Facto *Disestablishment*, 81 MARQ. L. REV. 203 (1998) [hereinafter Smith, De Facto *Disestablishment*].

> law curriculum's use of religion differs categorically from its use of economics, for instance, or moral and political philosophy, or feminist or critical race theory, or history, or (more occasionally) literary theory or sociology or psychology. By-and-large, religion is deemed significant and worthy of law's attention not because it provides potentially valuable perspectives or helpful insights, but because it constitutes a special kind of problem for the law.[2]

In response to this insightful analysis, I will not attempt to call into question Smith's descriptive account of this *de facto* disestablishment, but for the most part, I will presume that it accurately characterizes our legal discourse and argue that this *de facto* disestablishment has caused a blindness to the religious dimension of judicial decision making. Despite the *de facto* disestablishment of religion, I will try to illustrate the centrality of religion as a resource for understanding judicial decision making. The central question for this inquiry is: What, if any, is the role of religious beliefs in judicial decision making? To fully address this question would require setting forth a philosophy of law, a philosophy of religion, and an interpretation of the religion clauses of the First Amendment,[3] which I obviously cannot do in this brief response.[4] However, to begin answering this question and to respond to Smith's *de facto* disestablishment thesis, I will provide a broad overview of a more complete argument (*i.e.*, an abridged argument) supporting

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2. *Id.* at 213. *See also* David M. Smolin, *Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 LOY. L.A. L. REV. 1487, 1507 (1996) ("The field of law and religion has a marginal existence in the legal academy apparently primarily due to a lack of interest and competency by law professors.").

3. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". U.S. CONST. amend. I. With respect to an interpretation of the religion clauses of the First Amendment, I will presuppose Michael Perry's argument that the essence of "the free exercise and nonestablishment norms is that government may not make judgments about the value or disvalue—the true value, the moral value, the social value, any kind of value—of religions or religious practices or religious (theological) tenets." MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 9 (1997) [hereinafter PERRY, RELIGION IN POLITICS]. In sum, he argues that both the free exercise and nonestablishment norms are anti-discrimination provisions. The free exercise norm means that the government may not take prohibitory action which disfavors one or more religious practices as such. Likewise, the nonestablishment norm means that the government may not take action favoring one or more religions as such (in effect discriminating against others).

4. *Cf.* FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND DEMOCRATIC RESOLUTION 5, 8 (1995). Gamwell argues that both a political philosophy and a philosophy of religion are required to answer the question: "What, if anything, is the proper relation between politics and religion, given that the political community includes an indeterminate plurality of legitimate religions?" *Id.* at 8.

the thesis that judicial deliberation necessarily relies on a comprehensive or religious conviction about authentic human existence in hard cases but that the establishment clause of the First Amendment requires that these comprehensive claims remain implicit in judicial opinions.

In order to support this abridged argument, I will summarily propose a formal definition of religion as a "comprehensive claim or conviction about human authenticity."[5] I will also assume that the law is indeterminate (in some moderate sense) such that there are hard cases where the apparently relevant statutes, common law principles, contracts, or constitutional provisions at issue do not clearly resolve disputes. Given this understanding of law and religion, I will then chart the logically possible models for the relationship between law and religion in judicial decision making in hard cases. Before setting forth my position, I will consider and point out problems with the "*de facto* disestablishment model" that maintains that both the deliberative process and the process of justification in judicial decision making should be independent of comprehensive or religious convictions. John Rawls's model of the Supreme Court as the exemplar of public reason will be used to represent the *de facto* disestablishment model. Finally, I will illustrate my position by briefly examining the Supreme Court opinion and *en banc* Ninth Circuit opinion in *Washington v.*

5. Some claim that there is no universally accepted definition of religion (or method of defining it) and probably never will be. *Cf.* Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 454 (1998) (pointing out the difficulties of defining religion and identifying "the goal of religious studies in the undergraduate context and in legal and political ones, but also in a scholarly setting, is to develop a common discourse about religion and religious difference"). Others argue that "[r]eligion is one thing to the anthropologist, another to the sociologist, another to the psychologist," another to the theologian, and another to the philosopher. JOHN HICK, PHILOSOPHY OF RELIGION 3 (2d ed. 1973). However, this results in part from the different purposes of the many types of inquiries that analyze the nature of religion including the anthropology of religion (*e.g.*, Clifford Geertz), sociology of religion (*e.g.*, Emile Durkheim, Peter L. Berger), psychology of religion (e.g., William James), history of religions (*e.g.*, Mircea Eliade), theology (*e.g.*, Paul Tillich), and philosophy of religion (*e.g.*, Charles Hartshorne). For example, sociology of religion views religion "in terms of social interaction" and studies religion "with reference to the general concepts of sociology, including leadership, stratification, and socialization." GEORGE A. THEODORSON & ACHILLES G. THEODORSON, A MODERN DICTIONARY OF SOCIOLOGY 406 (1969). For our purposes, however, the central concern is to understand the role of religious convictions or claims in legal reasoning. The primary concern is with the kind of claims religion makes and how religious claims are related to other types of claims such as legal and moral claims. In contrast to other approaches to understanding religion like sociology and psychology of religion, the philosophy of religion has typically focused on these questions. Thus, I will take a philosophy of religion approach in order to define religion in such a way as to outline the relationship between religious claims and legal and moral claims.

Glucksberg.[6] Both of these opinions help disclose the necessity of relying on comprehensive or religious claims about authentic human existence in hard cases.

II. CLARIFYING THE ISSUES AND MODELS

Since we know that judicial decision making involves both deliberation and justification, the question about the role of religious beliefs in judicial decision making should be more precisely analyzed into two separate issues: (1) Is it proper for a judge to rely on religious beliefs in deliberation, and if so, under what circumstances and in which cases?; and (2) Is it proper for a judge to announce a religious basis for a decision in a judicial opinion, and if so, under what circumstances and in which cases? The first issue concerns what is entailed in the process of legal reasoning as such (the deliberative process) while the second issue concerns what types of reasons judges should be allowed to rely on in written judicial opinions (the process of justification) in a pluralistic democratic society.

By keeping these issues distinct, we explicitly recognize the four logical possibilities for the role of religious beliefs in judicial decision making. The four possibilities include:

6. 117 S. Ct. 2258 (1997). By using a hard case that strongly supports the necessary judicial reliance on religious or comprehensive claims about authentic human existence (*i.e.*, whether life is ever not worth living and suicide is warranted), I do not mean to suggest that these are the only or primary types of hard cases where religious claims are relied on. *But cf.* PERRY, RELIGION IN POLITICS, *supra* note 3, at 3-4 (emphasizing that he is principally concerned in this book with political choices "that ban or otherwise disfavor one or another sort of human conduct on the view that the conduct is immoral."); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L. J. 433, 435 (1993) (emphasizing that "this Note does not necessarily envision an explicit role for religious values in the vast majority of legal controversies; rather, the focus is on ethically difficult cases, or other so-called 'hard cases,' where judicial reference to religious values, among others, may be particularly appropriate, helpful, and even necessary"). Rather, my general thesis is that comprehensive convictions are relied upon in *all* hard cases not just some hard cases. Cases like *Washington v. Glucksberg* have the advantage of disclosing more explicitly the necessity of relying on comprehensive convictions while other hard cases may appear to rely only on non-comprehensive norms (*e.g.*, notions of property) which are linked to comprehensive or religious convictions in a less obvious way. Thus, to make the strongest case (in this abridged argument) for the reliance on comprehensive convictions in the judicial deliberation of hard cases, I will only focus on *Washington v. Glucksberg* in the following discussion.

	Deliberation	Justification	Model of Judicial Decision Making
Religious Beliefs	no	no	disestablishment
Can or Must Be[7]	yes	yes	religionist
Relied on in Judicial	no	yes	disestablishment-religionist
Decision Making	yes	no	religionist-disestablishment

Further, from this chart, we can develop four different models of judicial decision making. I will refer to the first possibility as the *de facto* disestablishment model[8] of judicial decision making. It maintains that religious beliefs or convictions should not be relied on either in deliberation or justification. Given the predominance and often unexamined or blind acceptance of this model, the conclusion is usually that religion should have nothing to do with judicial decision making. For this reason, the other three models are usually not given a second thought; the *de facto* disestablishment has blinded us from fully appreciating these other models.

One reason for this pervasive blindness is that the second model which maintains that religious convictions can or should be relied on in judicial deliberation and justification (the religionist model) is usually considered the only alternative to the disestablishment model. In fact, if deliberation and justification are not differentiated, this is the only alternative to the disestablishment model. Within certain constraints, the religionist model was vigorously embraced by judges in nineteenth century. For example, in *Vidal v. Girard's Executors*,[9] Joseph Story

7. It should be noted that allowing judges to rely on religious beliefs or convictions in judicial deliberation or justification could take the form of a permissive use of these beliefs (can) or a required use of these beliefs (must) while a prohibition against relying on religious beliefs or convictions in judicial decision making only takes the form of a requirement not to rely on these beliefs. In addition, for an alternative matrix of models for the relationship between law and religion in judicial decision making, *see* Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523 (1998).

8. Note that for the sake of brevity, I will usually refer to this as the "disestablishment model" rather than the *de facto* disestablishment model." Further, I think Steven Smith clearly demonstrates that the *de facto* disestablishment goes far beyond the required *de jure* disestablishment. However, as the First Amendment religion clause jurisprudence clearly indicates, it is often very difficult to determine precisely where the *de jure* disestablishment ends and the *de facto* disestablishment begins.

9. 43 U.S. 126 (1844).

made his famous claims that the United States was a "Christian Nation" and that "the Christian religion is a part of the common law."[10] Currently, this position does not receive much support.[11] For reasons I cannot fully specify here and for reasons given below, the religionist model would appear to violate the establishment clause by favoring one or more religions as such (in effect discriminating against others).[12] Thus, I will not consider the religionist model as a viable alternative to the disestablishment model.

In addition, these reasons and others would also eliminate the third model which holds that religious convictions should not be relied on in deliberation but can or should be relied on in justification (disestablishment-religionist model). If the judge accepted the distinction between "legal reasons" and "religious reasons" with respect to deliberation, it is hard to think of a reason why she would give up on this distinction with respect to the process of justification. Unless the judge was part of a society that was explicitly ruled by religious law (*e.g.*, an Islamic country), it is hard to see this model as viable. Consequently,

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10. *Id.* at 128. *See also* Joseph Story, *Christianity a Part of the Common Law*, 9 AM. JURIST 346 (1833); CUSHING STROUT, THE NEW HEAVENS AND NEW EARTH: POLITICAL RELIGION IN AMERICA 99 (1974) (noting that many early state court decisions "assumed that Christianity was itself part of the common law inherited from England"); Harold Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV. 405, 406 (1980) (noting that courts in the nineteenth century "declared very often that the Christian religion is the law of the land, that Christianity is part of the common law, and that the Constitution on its face shows that the Christian religion was the religion of the framers").

11. *See* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 142 (1995) ("Judges assume that people in this country have variant religious views.... [n]o particular religious view is seen to be embedded in the legal materials themselves or to be part of some common understanding or technique of reason that stretches beyond the legal materials but can be a source of guidance."). *But cf.* Wendell L. Griffen, *The Case for Religious Values in Judicial Decision Making*, 81 MARQ. L. REV. 513 (1998) (arguing that judges "have the right to include religious sources when [they] justify the decisions [they] reach" even though "religious values are not universally shared by all persons, or even all judges for that matter"). Michael Perry has also made some statements that suggest support for this model in certain circumstances. *See* PERRY, RELIGION IN POLITICS, *supra* note 3, at 103-04. Perry argues that "[i]f a plausible secular premise *does* support [a political] choice... government, including the judicial branch, may rely on a religious premise." *Id.* at 103. Perry subsequently questions whether a legal decision can be " 'reasoned and available to the public' if in its opinion a court conceals one of the premises on which it has consciously relied" and thus implies that the court should disclose its reliance on a religious premise in its opinion. *Id.* at 104.

12. Although Michael Perry probably would not agree with this assessment of disclosing religious convictions in written opinions, *see supra* note 11, I am relying on his interpretation of the religion clause as anti-discrimination provisions. *See* PERRY, RELIGION IN POLITICS, *supra* note 3, at 9. In this respect, the *de facto* disestablishment of religion from legal discourse is probably better characterized as a *de jure* disestablishment.

since this is not the case in the United States, this does not appear to be a viable model worthy of further consideration.

However, the apparent *de facto* disestablishment of religion from legal discourse does not necessarily mean that religion should or can be disestablished from legal deliberation in hard cases. The fourth model (religionist-disestablishment model) was first identified by Kent Greenawalt[13] and soon thereafter embraced by Stephen Carter.[14] Greenawalt argues that "shared premises and ways of reasoning have priority and that these will get judges all of the way in the vast majority of cases," but that "on exceptional occasions the indecisiveness of legal and public reasons will be sufficiently apparent to allow a judge to make a self-conscious use of personal convictions [including comprehensive and religious convictions]."[15] By contrast, Carter argues for a larger role for religious convictions such that in any cases where judges must rely on moral convictions (*e.g.*, fundamental rights cases), religiously grounded moral beliefs should not be treated differently from other moral convictions.[16] Although not explicitly addressing the merits of these positions, the burden of the following discussion is to make a much stronger argument for this position. It attempts to demonstrate that judges necessarily rely (implicitly or explicitly) on religious or comprehensive convictions about authentic human existence in all hard cases. Moreover, given the preceding evaluation of the other models, the only alternative to this position that will be considered is the disestablishment model which maintains that religious beliefs should not enter into either deliberation or justification.

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13. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239-41 (1988); *see also* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 11, at 142-50.

14. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989) (arguing that "if religious conviction plays a role at all, it would enter into the deliberative process, but not the process of justification").

15. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 11, at 149-50.

16. Carter, *supra* note 14, at 935, 943.

III. DEFINING RELIGION AND LAW

A. Definition of Religion[17]

Regarding the definition of religion, I will adopt and slightly modify Schubert Ogden's definition of religion as "the primary form of culture in terms of which we human beings explicitly ask and answer the existential question of the meaning of ultimate reality for us."[18] According to this account, religion asks what is "authentic human existence" or "how are we to understand ourselves and others in relation to the whole".[19] The existential question, the question of meaning, is thus the question which is presupposed by all other questions. It is the comprehensive question concerning "what is the valid comprehensive self-understanding" or "comprehensive human purpose."[20] In other words, religion includes a comprehensive

17. Although definitions are not something that can be said to be definitively true or right, the one I will propose serves the purpose of putting on equal footing all arguably "extra-legal" claims about "authentic human existence". *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 32 (1996) (Commenting on the definition of law, Bix claims that, "one might not be able to say that a particular conceptual analysis was 'right' or 'true' (at least not in the sense that there would be only one unique 'right' or 'true' answer for all conceptual questions), but I do not see this as a significant loss. It would be sufficient that one can affirm (or deny) that an analysis is good (or better than an alternative) for a particular purpose."). As a practical matter, this is very helpful because it treats all of these imported normative claims as similar for purposes of considering the legitimacy of legal decision making under conditions of indeterminacy. By calling all these claims religious, we signal both that they are typically considered "extra-legal" and that they are considered to be normative claims about authentic human existence that judges are relying on in judicial decision making. In other words, these claims have an equivalence in terms of their type ("extra-legal") and in terms their logical function (normative claims about "authentic human existence"). On this account, this definition of religion seems better than the narrow definition of religion in theistic terms because it makes explicit all the "extra-legal" normative claims about authentic human existence that may be informing legal decision making. Furthermore, this definition of religion is offered for the purpose of engaging the liberal claim that legal and political principles can somehow be independent of religious or metaphysical claims (*i.e.*, as Rawls says, "political not metaphysical"), and it helps us determine more precisely whether legal decision making can be done based on political and not metaphysical norms.

18. SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5 (1992). *Cf.* MICHAEL J. PERRY, LOVE & POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 73 (1991) ("Religious faith is best understood as trust in the ultimate meaningfulness of life—that is, the ultimate meaningfulness of the world and of one's own life, one's own being, as part of and related to, as embedded in, the world.").

19. OGDEN, *supra* note 18, at 6.

20. GAMWELL, *supra* note 4, at 22-23. Gamwell explicitly recognizes that his "definition and discussion of religion is nothing other than an attempt to appropriate [Ogden's] formulations for the purpose of the present inquiry." *Id.* at 15 n.1. *Cf.* Smith, *supra* note 1, at

evaluation of life (human activity) in terms of the nature of existence to determine "how human activity as such ought to make a difference to the larger reality of which it is a part."[21] In fact, "everything that we think, say, or do, insofar, at least, as it makes or implies a claim to validity, necessarily presupposes that ultimate reality is such as to authorize some understanding of ourselves as authentic and that, conversely, some understanding of our existence is authentic because it is authorized by ultimate reality."[22] On this account, religion is essential to understanding all human activity (including judicial decision making) because we ask and answer the existential or comprehensive question, at least implicitly, in all human activity.[23] Thus, all human activity (including judicial decision making) is implicitly or explicitly informed by a comprehensive self-understanding or an understanding of what constitutes authentic human existence which determines how any particular human activity (*e.g.*, judicial decision making) is related to the purpose of human life as such (authentic human existence).

Consequently, for the purposes of this discussion, "religion" will be equated with a "comprehensive claim or conviction about human authenticity." This means that religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential question. Further, this means that there is and always has been a plurality of religions or comprehensive self-understandings. As a result, judges, at least implicitly, have comprehensive self-understandings (*i.e.*, they are religious), and they rely on a plurality of comprehensive religious convictions in the deliberation of hard cases.

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216 (claiming that "what we call 'religion' typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects *everything*").

21. GAMWELL, *supra* note 4, at 25.

22. OGDEN, *supra* note 18, at 7.

23. *See* GAMWELL, *supra* note 4, at 23. Gamwell further notes that this does not mean that all human activity is religious but that "the character of human activity as such implies the *possibility* of religion, in the sense that it implies the comprehensive question and, therefore, the possibility that this question is asked and answered explicitly." *Id.* at 23 n.5. Human activity is thus religious only to the extent that the existential or comprehensive question has been explicitly asked and answered. *See Id.* For the purposes of this article, however, I will ignore this distinction and use the terms religious and comprehensive interchangeably.

B. Definition of Law

As with my summary treatment of the central question of the philosophy of religion ("what is religion?"), I will likewise not attempt to give a complete answer to the central question of jurisprudence or the philosophy of law ("what is law?"). While a full consideration of the question of the role of religious beliefs in judicial decision making would require both a descriptive and normative account of law, I will elaborate a normative account of law only to the extent required to determine whether religious beliefs ought to play a role in judicial decision making and make one essential descriptive assumption. The essential descriptive assumption is that the law is indeterminate such that there are hard cases where the apparently relevant statutes, common law principles, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. Many theorists now refer to this broadly as legal indeterminacy.[24]

Note that even H.L.A. Hart's manifesto of legal positivism, *The Concept of Law*, takes a middle path between formalism and rule skepticism such that the indeterminacy of the law allows for "varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statue or precedent."[25] Hart helps make clear here that this open texture or indeterminacy concerns not only "particular legal rules" but also "the ultimate criteria of validity" which he refers to as "the rule of recognition" (*e.g.* United States Constitution). With respect to the rule of recognition, this results in a paradoxical situation where courts are determining the ultimate criteria of legal validity in the process of deciding whether a particular law is valid.[26] In order to make the strongest case for the religionist-disestablishment model, I will define

24. *See, e.g.*, Ken Kress, *Legal Indeterminacy and Legitimacy*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 200-15 (Gregory Leyh ed. 1992).

25. H.L.A. HART, THE CONCEPT OF LAW 144 (2d ed. 1989). Hart notes that the rule of recognition can be partly, but never completely, indeterminate. For example, in the United States, the United States Constitution could be indeterminate in some sense, but the rule of recognition conferring authority (jurisdiction) on the court to exercise its creative powers to settle the ultimate criteria of validity raises no doubts even though the precise scope of that power may raise some doubts. *Id.* at 148-49. Note further that by taking this middle path, I will not be addressing formalism (*e.g.*, Ernest Weinrib) and rule skepticism (*e.g.*, critical legal studies, deconstructionism, some legal realists). These theories would involve a different discussion than the discussion here which involves an assumption that the law is determinate in some sense (*i.e.*, there are easy cases) but also that it is indeterminate or has an open texture in some sense (*i.e.*, there are hard cases).

26. *Id.* at 148.

hard cases as those where the primary rules (*e.g.*, statutes and case law) and the rule of recognition are indeterminate in some sense.[27] Hart claims that "the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases" and that courts must exercise the restricted law-making function which he refers to as discretion.[28] Consequently, in hard cases, the judge "is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."[29]

IV. NORMATIVE MODELS

Given this descriptive account of the indeterminacy of the law, it is at this point that a normative account of law (*i.e.*, a rational justification or legitimation of law) must be called upon to specify what "standards or reasons for decisions which are not dictated by law" a judge should rely on in hard cases. In this respect, I will elaborate a normative account of law only to the extent required to determine whether religious beliefs ought to play a role in judicial decision making and in which cases. Assuming that the law is determinate in some sense (*i.e.*, some cases are easy) and that judges have a duty to apply the law, both the normative models identified above (the disestablishment model and the religionist-disestablishment model) must accept that the law is independent of comprehensive convictions at least in easy cases. Further, these models can be recast in terms of the preceding descriptive account of legal indeterminacy as follows: either the rule of recognition is unitary such that it justifies all legal decisions independently of comprehensive convictions—even in hard cases—(disestablishment model) or the rule of recognition is two-tiered such that in easy cases the

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27. Hart refers to the descriptive account of law as the external point of view and the normative account of law as the internal point of view. *Id.* at 86-88. From the external point of view, Hart claims that "two minimum conditions" are "necessary and sufficient for the existence of a legal system" which is a union of primary and secondary rules:

> On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed [primary rules], and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials [secondary rules].

Id. at 113. Consequently, the normative validity of law (participant or internal point of view) is determined with respect the secondary rule referred to as the "rule of recognition" which is "ultimate criteria of validity".

28. *Id.* at 252 (emphasis in original).

29. *Id.* at 273.

law is independent of comprehensive convictions but in hard cases it is not (religionist-disestablishment model). Although these two models could take several forms,[30] I will examine these models by engaging John Rawls as an example of the first model and by presenting my position as an example of the second model.

A. The Disestablishment Model: Rawls's Idea of Public Reason

In evaluating Rawls as the disestablishment model, the following does not attempt to summarize Rawls's complete theory of Political Liberalism. Rather, it focuses on the idea of public reason and, in particular, how judges rely on public reason in hard cases involving constitutional essentials (*i.e.*, political rights and liberties) and matters of basic justice (*i.e.*, matters relating to the basic structure of society such as basic economic and social justice which are not covered by the constitution).[31]

In *Political Liberalism*, Rawls argues that from two basic ideas (the idea of society as a fair system of cooperation and the idea of persons as free and equal) implicit in a democratic political culture, we can specify the conditions (*i.e.*, the original position—including its thick veil of ignorance) for coming to an agreement on a political conception of justice in a democratic society. Rawls claims that this thought experiment establishes this conception of justice as "freestanding" (*i.e.*, "political not metaphysical") in that it does not depend upon a comprehensive doctrine for its justification. However, Rawls argues that "an agreement on a political conception of justice is to no effect without a companion agreement on guidelines of public inquiry and rules for assessing evidence."[32] Rawls argues that his idea of public reason indicates what these guidelines and rules would entail in a democratic society of free and equal citizens. The "content of public reason" is formulated by a political conception of justice ("political

30. For example, another representative of the disestablishment model is Jurgen Habermas. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 28 (William Rehg trans., 1996) Habermas maintains that the discourse of application (including both the process of deliberation and justification) allows for an impartial application of law that is independent of comprehensive religious or metaphysical worldviews. *Id.* In addition, Greenawalt and Carter were identified above as alternative representations of the religionist-disestablishment model. *See supra* notes 11-14 and accompanying text.

31. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767 (1997) (emphasis added) [hereinafter Rawls, *Public Reason Revisited*]. *Cf.* JOHN RAWLS, POLITICAL LIBERALISM 213 (paperback ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM].

32. RAWLS, POLITICAL LIBERALISM, *supra* note 31, at 139.

values of public reason") which includes two parts and two values: (1) substantive principles of justice for the basic structure ("the values of political justice"), and (2) "guidelines of inquiry" including "principles of reasoning and rules of evidence in light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" ("the values of public reason").[33]

With respect to judicial decision making, Rawls argues that both the deliberative process and the process of justification should rely solely on the political values of public reason, which are independent of comprehensive religious, philosophical, or moral doctrines.[34] Rawls maintains that "the political values of public reason provide the Court's basis for interpretation. A political conception of justice covers the fundamental questions addressed by higher law and sets out the political values in terms of which they can be decided."[35] Further, in hard cases, Rawls argues that judges should seek the best interpretation of the law. The best interpretation is the one that "best fits" the constitution and relevant statutes and precedent and the one that can be given an objective justification based on a public political conception of justice (political values of public reason).[36] Further, "public reason is the sole reason the court exercises" ("they have no other reason and no other values than political") while "[c]itizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake."[37] For Rawls, the United States Supreme Court is the exemplar of public reason. In this respect, he further emphasizes that

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33. *Id.* at 223-24. Note that with respect to the content of public reason, Rawls appears to use the term "public reason" in a broad and narrow sense. The content of public reason (broad sense) is a political conception of justice which includes principles of justice (values of political justice) and guidelines of inquiry (values of public reason) (narrow sense). When I use the term "political values of public reason," I will be referring to the broad sense (including the values of political justice and public reason), and when I use the term "values of public reason," I will be referring to the narrow sense. In the narrow sense, Rawls further maintains that "[t]he values of public reason not only include the appropriate use of the fundamental concepts of judgment, inference, and evidence, but also the virtues of reasonableness and fairmindedness as shown in abiding by the criteria and procedures of commonsense knowledge and accepting the methods and conclusions of science when not controversial." *Id.* at 139.

34. *Id.* at 139.

35. *Id.* at 234.

36. In contrast to Dworkin, Rawls maintains that "[t]he values the judges can invoke are restricted to what is reasonably believed to be covered by that conception or its variants, and not by a conception of morality as such, not even of political morality." *Id.* at 237 n. 23.

37. *Id.* at 235.

> [t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.[38]

Thus, when the relevant legal materials are indeterminate, Rawls maintains that the court must rely on the political values of public reason to resolve a dispute about constitutional essentials or matters of basic justice.

However, Rawls's idea of public reason as a "political not metaphysical" solution to legal indeterminacy has some serious problems that may call its validity into question. First, as Michael Perry has recently noted, Rawls fails to tell us what a judge may rely on if the political values of public reason (political conception of justice), like the relevant legal materials, are indeterminate.[39] In other words, if the rule of recognition (political values of public reason) is indeterminate, what normative basis does the judge rely on to come to a decision. Rawls argues that this is rare,[40] but Perry has emphasized that "he is simply wrong."[41] Although Rawls further recognizes that "public reason often allows more than one reasonable answer to any particular question,"[42]

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38. *Id.* at 236.

39. PERRY, RELIGION IN POLITICS, *supra* note 3, at 103.

40. Rawls notes that,

> [o]ne objection to the wide view of public reason is that it is still too restrictive. However, to establish this, we must find pressing questions of constitutional essentials or matters of basic justice (IV:5) that cannot be reasonably resolved by political values expressed by any of the existing reasonable political conceptions, nor also by any such conception that could be worked out. [Political Liberalism] doesn't argue that this can never happen; it only suggests that it rarely does so. Whether public reason can settle all, or almost all, political questions by a reasonable ordering of political values cannot be decided in the abstract independent of actual cases.

RAWLS, POLITICAL LIBERALISM, *supra* note 32, at liii. He further criticizes those, like Greenawalt, who argue that public reason may fail to resolve some of these questions and advocate that citizens may resort to nonpolitical values to resolve these issues.

41. PERRY, RELIGION IN POLITICS, *supra* note 3, at 103.

42. RAWLS, POLITICAL LIBERALISM, *supra* note 32, at 240. Rawls further notes "that different political conceptions of justice will represent different interpretations of the constitutional essentials and matters of basic justice" and that "[t]here are also different interpretations of the same conception, since its concepts and values may be take in different ways." Rawls, *Public Reason Revisited*, *supra* note 31, at 777 n.35. Although he recognizes that "[t]here is not... a sharp line between where a political conception ends and its

his practical application of the political values of public reason (political conception of justice) to concrete questions (*e.g.*, abortion) and the majority of his other comments suggest that he considers the political values of public reason quite determinate or complete such that "the values specified by it can be suitably ordered or otherwise united so that those values alone give a reasonable answer to all, or to nearly all, questions involving constitutional essentials and matters of basic justice."[43] Certainly, we cannot settle this question here. However, one insightful example of Rawls's belief in the "completeness" of the political values of public reason is his claim that "any reasonable balance of these three [political] values ["due respect for human life," "ordered reproduction of political society over time," and "equality of women as equal citizens"] will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester."[44] The ease with which he comes to this conclusion about the hotly debated issue of abortion raises serious doubts about the credibility of Rawls's claim that the political values of public reason can provide "a reasonable answer to all, or to nearly all, questions involving the constitutional essentials and basic questions of justice." Furthermore, although this example does not refute Rawls's claims about the completeness of the political values of public reason (*i.e.*, that the political values of public reason are able to resolve most, if not all, disputes), it suggests that Rawls has a highly formalistic understanding of legal adjudication (at least with respect to the functioning of the political values of public reason—the rule of recognition—in hard cases). As a result, either the political values of public reason are more indeterminate or incomplete than Rawls claims, or they are more determinate or complete than most legal scholars and lawyers could credibly acknowledge. Thus, in the first case, comprehensive doctrines

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interpretation begins," Rawls concludes that "a conception greatly limits its possible interpretations, otherwise discussion and argument could not proceed." *Id.*

43. Rawls, *Public Reason Revisited*, *supra* note 31, at 777. *See also* RAWLS, POLITICAL LIBERALISM, *supra* note 32, at 225 (emphasis added). "The significance of completeness lies in the fact that unless a political conception is complete, it is not an adequate framework of thought in the light of which the discussion of fundamental political conceptions can be carried out." Rawls, *Public Reason Revisited*, *supra* note 31, at 777.

44. RAWLS, POLITICAL LIBERALISM, *supra* note 32, at 243 n.32. Although Rawls now characterizes this analysis of the abortion question as his opinion rather than an argument, he suggests that it could be developed into an argument and that the outcome of a vote to support this would be legitimate "provided all government officials, supported by other reasonable citizens, or a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason." Rawls, *Public Reason Revisited, supra*, note 31, at 798, 798 n.80.

may be relied on to resolve hard cases (like the religionist-disestablishment model), or, in the second case, the disestablishment model requires the adoption of some form of legal formalism which most legal scholars and lawyers would reject.

In addition, Rawls's public reason requires religious judges to order the political values of public reason in hard cases on grounds they cannot accept as valid. Recall that when the relevant legal materials are indeterminate, Rawls maintains that the court must rely on the political values of public reason to resolve a dispute about constitutional essentials or matters of basic justice. Further, Rawls argues that in order for the political values alone to "give a reasonable answer to all, or nearly all, questions involving constitutional essentials and matters of basic justice," the ordering of values must be made

> in light of their structure and features within the political conception itself, and not primarily from how they occur within citizens' comprehensive doctrines. Political values are not to be ordered by viewing them separately and detached from one another or from any definite context. They are not puppets manipulated from behind the scenes by comprehensive doctrines.[45]

No religious judge, however, could accept this "political not metaphysical" ordering of political values in hard cases. A comprehensive or religious conviction "purports to identify the necessary and sufficient moral condition or comprehensive condition of all valid moral claims."[46] Thus, for the religious judge, an ordering of political values is valid only if it coincides with the ordering dictated by her comprehensive or religious convictions. Yet, Rawls's political liberalism maintains that the political values of public reason must be ordered exclusively by a "political not metaphysical" conception of justice (freestanding) even in hard cases. In other words, this requires that every religious adherent reject their claim that his or her comprehensive conviction is valid. Only those judges who deny all comprehensive convictions (*i.e.*, believe that political values are independent of any particular answer to the comprehensive question) could accept Rawls's "political not metaphysical" ordering of political values in hard cases.[47] As a result, it is not clear how a liberal political

45. Rawls, *Public Reason Revisited, supra* note 31, at 777.

46. GAMWELL, *supra* note 4, at 71.

47. *Cf.* GAMWELL, *supra* note 4, at 73 ("At best, in other words, the consensus that Rawls's political liberalism requires is joined only by those who deny all comprehensive convictions, citizens who believe that principles of justice are independent of any particular

conception of justice (political values of public reason) could be the subject of an overlapping consensus of reasonable comprehensive doctrines that Rawls claims is required for a stable society. Thus, either the acceptance of the exclusively political ordering of political values is a mere *modus vivendi*[48] or no consensus is possible (there is a plurality of orderings of political values informing the law—the religionist-disestablishment model). Moreover, although these criticisms of Rawls's idea of public reason are not necessarily conclusive, they raise serious doubts about the viability of the disestablishment model.

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answer to the comprehensive question because no comprehensive conviction is valid."). Rawls position, however, may finally be incoherent because he claims that an objective legitimization of law must be independent of comprehensive convictions (*i.e.*, based on the political values of public reason) because comprehensive convictions are nonpublic (*i.e.*, not reasonable). However, this claim entails a comprehensive denial of all comprehensive convictions (moral relativism) which according to Rawls is not possible and thus results in an incoherent account of judicial decision making. In this respect, Franklin Gamwell argues that "[b]ecause a denial of all religious or comprehensive convictions is itself a (negative) comprehensive claim, it prevents the validation or justification of *any* positive beliefs about human authenticity, comprehensive or otherwise." GAMWELL, *supra* note 4, at 139. In other words,

> [i]f there is no character or positive principle of human authenticity that is valid under all historical conditions, then all valid understandings of human authenticity must be relative to some or other specific circumstances. But, then, no moral claim could be justified without validating moral relativism, and moral relativism is a *positive* claim about human authenticity, the validity of which cannot be relative to specific circumstances. To assert that the moral norms of every actual and possible human activity are in all respects relative is to make a positive claim about human activity that is comprehensive. In other words, moral relativism is self-refuting because it implies the comprehensive condition that it denies, and therefore, the denial of all comprehensive convictions prevents the validation of any moral claim at all.

Id. at 139-40. Thus, Rawls claim that a political conception of justice (political values of public reason) must be independent of comprehensive claims implies a comprehensive denial of comprehensive convictions (moral relativism) and is self-refuting.

48. Rawls argues that a stable society requires an overlapping consensus on a political conception of justice and not merely a *modus vivendi*. A *modus vivendi* is merely a strategic agreement "founded on a convergence of self- or group-interests" that the principles of justice are amenable to a certain agenda of political action. Rawls gives the example of a treaty between two nations who are in general "ready to pursue their goals at the expense of the other" but agree not to because under circumstances it is beneficial not to do so. RAWLS, POLITICAL LIBERALISM, *supra* note 32, at 147. Furthermore, Rawls thinks that a *modus vivendi* is inherently unstable because the alliances formed by nations or citizens are dependent upon a certain balance of power in the society. If the balance of power changes, they would no long agree that the principles of justice are warranted.

B. The Religionist-Disestablishment Model and The Religious Dimension of Judicial Decision Making

Assuming that the preceding discussion has indicated some serious problems with Rawls's attempt to eliminate comprehensive or religious convictions from judicial deliberation (the disestablishment model), the only model remaining is the religionist-disestablishment model. Although the religionist-disestablishment model (like all four models) could take several forms,[49] I will not consider the different formulations of it, but I will focus on setting forth my interpretation of this model as an example of it. Under my interpretation, this model claims that the deliberative process of judicial decision making in hard cases always implicitly or explicitly relies on a religious or comprehensive conviction about "authentic human existence" but that the establishment clause of the first amendment requires that these comprehensive convictions should remain implicit in judicial opinions. For clarity, it should be noted that by using the phrase "implicitly or explicitly relies on a religious or comprehensive conviction about 'authentic human existence,'" I want to recognize that judges may or may not be self-conscious of their reliance on comprehensive convictions. Ideally, judges deliberating in hard cases would explicitly recognize that they are relying on comprehensive convictions. However, this will not always be the case. In those cases, my argument is that judges must, at least implicitly (unconsciously), rely on comprehensive convictions in order to resolve hard cases. Further, although I will be using a hard case to demonstrate the religious dimension of judging, I am not making an empirical argument linking religious affiliations or beliefs to judicial decisions[50] but a claim about the nature of judicial reasoning as such. To demonstrate the religious dimension of judging, I will first set forth the general argument that judicial decision making as such requires implicitly or explicitly relying on comprehensive convictions in hard cases. Secondly, I will examine how *Washington v. Glucksberg* dramatically demonstrates the necessary reliance on comprehensive claims about authentic human existence, at least implicitly, in the deliberation process in hard cases. Subsequently, I will set forth some reasons why comprehensive or religious claims should remain implicit in

49. *See supra* notes 13-16 and accompanying text.

50. *See, e.g.*, Scott C. Idleman, *supra* note 6, at 473-78 (analyzing the role of religious values in judicial decision making from four perspectives including the historical-constitutional, political-philosophical, utilitarian, and empirical perspectives); KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES (1987).

judicial decision making. Finally, in the course of this analysis, I will consider and respond to two objections—the Public Values Objection and the Insincerity Objection—to the religionist-disestablishment model.

1. The Necessity of Religious Convictions in Deliberation

Recall that religion is a "comprehensive claim or conviction about human authenticity" which provides individuals with an understanding of authentic human existence (a normative framework for all of life). Consequently, all humans have, at least implicitly, a comprehensive self-understanding (*i.e.*, they are religious). Furthermore, these comprehensive self-understandings inform all human activity (including judicial decision making) such that all normative claims about human purpose or authentic human existence implicitly or explicitly rely on religious convictions. Thus, with respect to normative issues, a comprehensive or religious conviction "purports to identify the necessary and sufficient moral condition or comprehensive condition of all valid moral claims."[51]

Further, recall that hard cases are those where the primary rules (*e.g.*, statutes and case law) and the rule of recognition (*e.g.*, United States Constitution) are indeterminate in some sense. Hard cases thus involve situations where some "extra-legal" norm must be relied upon to come to a judgment. Given that religious convictions identify the comprehensive condition of all valid norms, these norms must implicitly or explicitly rely on comprehensive or religious convictions about authentic human existence. Consequently, the nature of judicial decision making is such that in hard cases, all judicial deliberation necessarily relies implicitly or explicitly on comprehensive convictions not dictated by the law itself.[52]

More precisely, the religionist-disestablishment model maintains that the unstated rule of recognition (ultimate criteria of validity) is

51. GAMWELL, *supra* note 4, at 71.

52. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 90 (1986) (Dworkin argues that "[a]ny practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.") *See also* GREENAWALT, PRIVATE CONSEQUENCES, *supra* note 13, at 145 (Greenawalt argues that both he and Carter "believe a model of decision must include some reference to what is right (or what a judge believes is right) as a matter of moral and political philosophy, independent of the legal materials.").

formal and two-tiered: (1) in easy cases, judges are expected to resolve legal disputes according to the determinate legal principles; and (2) in hard cases, judges are expected to resolve legal disputes according to their best comprehensive or religious judgment of what ought to be done. In other words, the unstated rule of recognition is formal in that it allows for a plurality of substantive rules of recognition (ultimate criterions of validity) to inform the adjudication of hard cases. Consequently, in hard cases, judges' comprehensive convictions are the ultimate criterions of validity (rules of recognition) even though judges should keep these comprehensive convictions implicit in the process of justification to prevent the establishment of a comprehensive conviction.

Despite the plurality of comprehensive convictions informing judicial deliberation in hard cases, judges will not necessarily make highly divergent decisions in hard cases. First, judges may reach the same results and agree on low-level (noncomprehensive) principles in their written opinions even though their deliberations are informed by different comprehensive convictions. In Cass Sunstein's terms, these situations constitute "incompletely theorized agreements on practical outcomes."[53] In addition, there are influences on judicial decision making that promote convergence. For example, Ronald Dworkin has argued that despite the divergence in judicial convictions about those justifying purpose, goal, or principle governing legal practice as a whole, a variety of forces temper these differences and precipitate convergence.[54] In this respect, he claims that

> [e]very community has paradigms of law, propositions that in practice cannot be challenged without suggesting either corruption or ignorance . . . . The most powerful influences toward convergence, however, are internal to the character of interpretation. The practice of precedent, which no judge's interpretation can wholly ignore, presses toward agreement; each judges' theories of what judging really is will incorporate by reference, through whatever account and restructuring of precedent he settles on, aspects of other popular interpretations of the day. Judges think about law, moreover, within society, not

53. CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 37 (1996). Sunstein argues that law is basically comprised of "incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them." *Id.* This allows for substantial disagreement on more general theoretical principles that attempt to explain and legitimize the law. Consequently, "people may agree on a *correct* outcome even though they do not have a theory to account for their judgments." *Id.* at 7.

54. Dworkin, *supra* note 52 at 87-88.

> apart from it; the general intellectual environment, as well as the common language that reflects and protects that environment, exercises practical constraints on idiosyncrasy and conceptual constraints on imagination. The inevitable conservatism of formal legal education, and of the process of selecting lawyers for judicial and administrative office, adds further centripetal pressure.[55]

Although arguing for much more convergence than I would support,[56] Dworkin's general point can be extrapolated to apply to judicial reliance on comprehensive convictions. In that case, the necessary reliance on comprehensive convictions in hard cases does not necessarily mean that judges will make radically different interpretations of the law. Furthermore, both this convergence and "incompletely theorized agreements on particular outcomes" will make it appear as though judges are not relying on a plurality of comprehensive convictions in hard cases. As a result, this presents an additional reason why the disestablishment model has been so widely accepted and why the religious dimension of judicial decision making has remained substantially hidden.

2. *Washington v. Glucksberg*

However, in some hard cases like *Washington v. Glucksberg*, the necessary reliance on comprehensive convictions becomes more evident. It is for this reason that these cases are so contentious; their resolution requires relying on a bedrock religious or comprehensive conviction about authentic human existence. Consequently, in this section, it is important to keep in mind that the analysis of the Supreme Court and Ninth Circuit en banc opinions is done for a very specific purpose. The purpose is not to deem one result correct and the other false. Rather, the purpose is to demonstrate that both opinions implicitly rely on comprehensive convictions and thus support the religionist-disestablishment model of judicial decision making. Thus, in reading the following discussion, it is essential that these opinions are viewed

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55. *Id.* at 88. Cf. KARL N. LLEWELLYN, THE CASE LAW SYSTEM, §§. 55-58 (Michael Ansaldi, trans., Paul Gewirtz, ed., 1989) (arguing that sociological factors such as the operating technique of judges and lawyers, facts of a case, and real-life norms are powerful sources of certainty or predictability).

56. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996). Dworkin argues that "[o]ur constitution is law, and like all law it is anchored in history, practice, and integrity. Most cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction." *Id.*

with respect to this purpose and not with respect to the issue of which result was correct.

Washington v. Glucksberg[57] involved a Washington state criminal statute that makes "[p]romoting a suicide attempt" a felony. The Washington statute provides: "'A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.'"[58] The central issue before the court was whether Washington's ban on assisted suicide violated the Due Process clause of the Fourteenth Amendment.[59] The District Court held that "a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide."[60] Furthermore, the District Court held that the Washington ban on assisted suicide violated the Due Process Clause because it placed an undue burden on this constitutionally protected liberty interest and that it violated the Equal Protection Clause. The Ninth Circuit initially reversed, but on rehearing *en banc*, the Ninth Circuit affirmed the District Court on Due Process Clause grounds. Subsequently, the Supreme Court reversed. The Court held that there was not a fundamental right to assistance in committing suicide protected by the Due Process Clause and that the statute was rationally related to the legitimate governmental purposes.[61]

Rather than giving a complete analysis of the Supreme Court and the *en banc* Ninth Circuit opinions, I want to focus on three ways in which these opinions, especially the Ninth Circuit opinion, demonstrate that these Courts had to rely on a comprehensive or religious claim about authentic human existence to resolve this case. In other words, this case supports the religionist-disestablishment model by graphically demonstrating the necessary role of comprehensive convictions in

57. 117 S. Ct. 2258 (1997).

58. *Id.* at 2261 (quoting Wash. Rev. Code 9A.36.060(1) (1994)).

59. *Id.* The Fourteenth Amendment to the United States Constitution provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

60. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1462 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997). The plaintiffs included four Washington physicians who would assist certain of their terminally ill patients end their lives but for the statute banning assisted suicide, three gravely ill patients of these doctors who died after the case began, and a non-profit organization ("Compassion In Dying") that counsels people contemplating physician-assisted suicide.

61. *Id.* at 2271.

resolving hard cases and in exhibiting how these comprehensive convictions remain implicit in the Ninth Circuit and Supreme Court Opinions. For the most part, I will focus on the *en banc* Ninth Circuit opinion in *Compassion in Dying v. State of Washington*,[62] because it makes this reliance more evident than the Supreme Court opinion, and it provides a better example of the religionist-disestablishment model with respect to judicial opinion writing.

First, the Ninth Circuit's rhetoric suggests that the right to die is eminently a religious issue. Following the Supreme Court's approach to the abortion cases, the Ninth Circuit noted that the right to die and abortion cases present issues of "profound spiritual importance" and that "both arouse similar religious and moral concerns."[63] Further, in beginning its consideration of whether there was a liberty interest in the right to die, the Ninth Circuit "reiterate[d] a few fundamental precepts that guide[d] [them]." The first was a "cautionary note" from *Roe v. Wade*:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the . . . controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly *absolute convictions* that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, *one's religious training*, *one's attitudes toward life and family and their values*, and *the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions*.[64]

Obviously, these statements cannot establish the necessity of relying on comprehensive convictions in this case. However, when considered in relationship with the other aspects of this opinion and the Supreme Court opinion, these statements have an additive or cumulative effect of reinforcing the other two ways in which these opinions demonstrate the religionist-disestablishment model.

Second, the Ninth Circuit surveyed "historical attitudes" and "current societal attitudes" about suicide which further suggests that the Ninth Circuit realized that their determination of what constitutes a fundamental liberty interest would rely on, at least implicitly, a comprehensive or religious conviction about authentic human

62. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

63. *Id.* at 800-01.

64. *Id.* at 800 (quoting Roe v. Wade, 410 U.S. 113, 116, (1973)) (emphasis added).

existence.[65] For example, these surveys included Christian, Jewish (religious even under a narrow definition of religion), Greek, Stoic, and Roman attitudes toward suicide.[66] The court's discussion of these attitudes often identified the comprehensive notion of authentic human existence that legitimated or prohibited the act of suicide. For instance, the court noted that "the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became."[67] The court's explicit recognition of the role of comprehensive convictions in justifying or prohibiting suicide thus suggests that they were aware that their decision would finally have to rest on a comprehensive conviction and that it may rest or be influenced by one or more of those surveyed. Otherwise, the court could just have tallied who was for and who was against suicide without transcribing the comprehensive convictions which legitimate or prohibit suicide.

In addition, the Ninth Circuit's consideration of this wide range of attitudes about suicide results from its adoption of the broad method of Due Process Clause analysis.[68] This method focuses on preventing a premature limitation of the scope of liberty.[69] The goal is to treat liberty

65. *Compassion in Dying*, 79 F. 3d at 806-12. *See also Roe*, 410 U.S. at 160-63; Peter G. Daniels, *An Illinois Physician Assisted Suicide Act: A Merciful End to a Terminally Ill Criminal Tradition*, 28 LOY. U. CHI. L. J. 763, 837 n.24 (1997) (claiming that the origin of laws against suicide resides within Judeo-Christian values).

66. The parallel treatment of these different historical attitudes and contemporary societal attitudes by the courts in both *Compassion in Dying* and *Roe* supports a functional definition of religion (like the one proposed above) which treats all of these attitudes as religious or comprehensive claims about authentic human existence. It indicates the functional equivalence of these attitudes in justifying norms for resolving these hard cases.

67. *Compassion in Dying*, 79 F. 3d at 808 (quoting Thomas J. Marzen, et al., *Suicide: A Constitutional Right*, 24 DUQ. L. REV. 1, 25 (1985)).

68. The Ninth Circuit's broad method of Due Process analysis proceeded in two steps. In the first step, the court considered "whether there is a liberty interest in choosing the time and manner of one's death . . . Is there a right to die?" *Id.* at 798. In the second step, the court considered "whether prohibiting physicians from prescribing life-ending medication for use by terminally ill patients who wish to die violates the patients' due process rights." *Id.* at 799. Further, the second step involved applying a balancing test under which the court weighed the individual's liberty interest against the relevant state interests. As a result of this method, the Ninth Circuit held "that a liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause. *Id.* at 838.

69. In this respect, the court emphasized that "'[t]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere in the Constitution. This "liberty" is not a series of isolated points

as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"[70] and not to prejudge the issue based on previous wisdom and previous cases. The "rational continuum" is ascertained "in light of the existing circumstances as well as our historic traditions."[71] The review of historical and current societal views thus serves to challenge judges to rethink their presuppositions about liberty (*i.e.*, how the scope of liberty is determined by their comprehensive convictions about authentic human existence) and to ensure that the court is not missing an important restriction on liberty. Thus, the effect of the Ninth Circuit's adoption of the broad method was not only to disclose the necessity of relying on comprehensive convictions about authentic human existence to determine whether there was a liberty interest to commit suicide but also to prompt the court to explore alternative comprehensive or religious evaluations of suicide before making their evaluation of whether there was a fundamental liberty interest.

From the standpoint of the religionist-disestablishment model, the wisdom of this broad method is that the judicial opinion discloses the necessity of the religious dimension of judicial decision making in these hard cases (*i.e.*, minimizes the concealment of what is at stake) by surveying these attitudes. On the other hand, the opinion does not explicitly adopt one of these religious convictions. Rather, the court emphasized its "endeavor to conduct an objective analysis" and resolved the question by adopting a principle of liberty (a lower-level or noncomprehensive principle) as the basis of their ruling. Thus, this approach allowed for the possibility for a plurality of comprehensive convictions to support the same conclusion and prevented the establishment of one comprehensive conviction as the basis for determining what constitutes a fundamental liberty.

By contrast, the Supreme Court used a restrained method of Due Process Clause analysis. The Supreme Court's method of substantive-due-process analysis had two primary features: (1) requiring as a prerequisite that the fundamental right or liberty is "objectively, 'deeply rooted in this Nation's history and tradition' ... and 'implicit in the

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pricked out in terms of taking of property, freedom of speech, press, and religion ....'" *Id.* at 800 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). This discussion of the scope of liberty guaranteed by the Due Process Clause clearly indicates that the term liberty is indeterminate and that this is a hard case (*i.e.*, rule of recognition is indeterminate).

70. *Id.*

71. *Id.* at 803.

concept of ordered liberty'"; and (2) "a 'careful description' of the asserted fundamental liberty interest."[72] As is evident from the Supreme Court's "careful description of the asserted fundamental liberty interest" in defining the issue, the second feature determines what history is relevant. The Supreme Court defined the issue as: "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[73] This framing of the issue combined the question of the existence of a fundamental liberty interest (right to die) with a means of implementing that right (assistance) such that the issue becomes whether their is "an interest in implementing that general liberty interest by a particular means."[74] The effect of the Supreme Court's restrained method was to conceal as much as possible their reliance on a comprehensive conviction by framing the issue in such a way that the historical materials appeared to lead to one result. In this respect, the Supreme Court based its reversal of the Ninth Circuit on the grounds that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[75] As a result, the Court held that the asserted "right" to assisted suicide is not a fundamental liberty interest (*i.e.*, not "objectively, deeply rooted in this Nation's history and tradition") and that Washington's ban on assisted suicide did "not violate the fourteenth Amendment, either on its face or 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.'"[76]

The Court justified this restrained Due Process method on the grounds that it "tends to rein in the *subjective elements* that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case."[77] In other words, this method could be reformulated as a claim that Due Process Clause analysis must refer to some public values ("objectively, 'deeply rooted in this Nations' history and tradition'") rather than some

72. *Glucksberg*, 117 S. Ct. at 2268, 2269.

73. *Id.* at 2269.

74. *Compassion in Dying*, 79 F.3d at 801.

75. *Glucksberg*, 117 S. Ct. at 2271. The Court further noted that assisting suicide was a crime "[i]n almost every State—indeed, in almost every western democracy" and that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Id.* at 2263.

76. *Id.* at 2275 (quoting *Compassion in Dying*, 79 F.3d at 838).

77. *Id.* at 2268 (emphasis added).

"subjective element" (*i.e.*, comprehensive or religious conviction). We could call this the "Public Values Objection" to the religionist-disestablishment model in that it rejects judges relying on comprehensive or religious convictions to determine the scope of liberty (formally) provided for in the Due Process Clause. Note that the Supreme Court cited the history of regulating assisted suicide but did not consider the history of comprehensive or religious thinking on that issue or on the issue of suicide like the Ninth Circuit did. Rather, the Supreme Court's restrained Due Process method follows the disestablishment model so that "historical attitudes" and "current societal attitudes" (*i.e.*, comprehensive convictions) are perceived as subjective and irrelevant to the determination of the scope of political value of liberty. Conversely, history "objectively" determines the scope of the political value of liberty by identifying which notion of liberty is "objectively, 'deeply rooted in this Nation's history and tradition.'"

However, the religionist-disestablishment model could respond to the Political Values Objection as the Ninth Circuit did in *Compassion in Dying* by indicating that "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest;" history is not the sole guide for deciding whether there is a liberty interest.[78] In other words, the indeterminacy of the scope of the Due Process Clause notion of liberty cannot be "solved" by referring to history. First, history has to be evaluated to determine which aspect of it is the "relevant" history. In addition, the positions expressed in the relevant history must be evaluated to determine which position is authoritative. Consequently, both the Ninth Circuit and the Supreme Court implicitly relied on an extra-legal norm to determine which aspect of history was relevant and then which position expressed in the relevant history was authoritative. Since all norms implicitly or explicitly rely on a comprehensive or religious conviction, both courts implicitly relied on religious convictions about authentic human existence to evaluate history. Further, because "history" determines whether there is a fundamental liberty interest for the Supreme Court, this reveals that the Supreme Court's denial of a

78. *Compassion in Dying*, 79 F.3d at 805 (citing Loving v. Virginia, 388 U.S. 1 (1967)) (emphasizing that "[w]ere history our sole guide, the Virginia anti-miscegenation statute... would still be in force because anti-miscegenation laws were commonplace both when the United States was founded and when the Fourteenth Amendment was adopted"). Note that this argument about the necessary reliance on a comprehensive norm to evaluate history would also apply to claims that judges should rely on "community morality" in hard cases. In this respect, the Ninth Circuit's comments were referring to their own historical survey of comprehensive evaluations (community moralities) of suicide.

fundamental right to assisted suicide depended upon a comprehensive or religious conviction about authentic human existence. In addition, recall that even though the Ninth Circuit utilized a "rational continuum" or broad method of due process analysis, it did not philosophically analyze the concept of liberty to clarify the indeterminate notion of liberty in the Due Process Clause, but it also looked at history to ascertain what this indeterminate notion of liberty required. When it looked at history, it looked at the historical and current comprehensive evaluations of suicide rather than tallying legal prohibitions (like the Supreme Court) or surveying conceptual analyses of the concept of liberty. Therefore, even though the Ninth Circuit did not identify what more than history (*i.e.*, what extra-legal norm) informed their determination of the scope of liberty, their historical analysis suggests and logic requires that they relied on a comprehensive or religious conviction about authentic human existence to determine whether there was a fundamental liberty interest in determining the time and manner of one's own death. In this respect, it should be noted that neither court could finally give a satisfying account or defense of their determination of the scope of liberty and their evaluation of history because they could not explicitly acknowledge the comprehensive conviction that would make their decision more fully intelligible. Thus, the third way that these opinions demonstrate the necessary reliance on religious beliefs is to demonstrate the logical necessity of relying on religious claims about authentic human existence to determine the scope of liberty in the Due Process Clause.

The effect of implicating these comprehensive convictions about authentic human existence is most dramatically seen with respect to the radical differences in the two courts formulation of the issue. Recall that the Supreme Court defined the issue as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[79] By contrast, the Ninth circuit defined the issue in two parts ("whether there is a liberty interest in determining the time and manner of one's death" or "[i]s there a right to die?" and "whether prohibiting physicians from prescribing life-ending medication for use by terminally ill patients who wish to die violates the patients' due process rights") so that the right (right to die) and the means (medical assistance) were kept separate.[80] As a result, the relevant history considered by the Ninth

79. *Id.* at 2269.

80. *Compassion in Dying*, 79 F.3d at 798-99.

Circuit was the historical and current societal attitudes on suicide not on assisting suicide. Contrary to the Supreme Courts finding of a pervasive prohibition on assisting suicide, the Ninth Circuit found that "[t]oday, no state has a statute prohibiting suicide or attempted suicide; nor has any state had such a statute for at least 10 years."[81] Further, as the Ninth Circuit demonstrated, history is on both sides of the suicide question[82] such that they had to rely (implicitly) on a claim about authentic human existence in order to decide which history was authoritative.

One may respond that the Supreme Court's denial of this right implicitly relied on an understanding of authentic human existence but that the Ninth Circuit merely left the decision of suicide up to the individual. For example, in *Compassion in Dying*, the court cites *Casey* for the proposition that "'[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of person hood were they formed under the compulsion of the State.'"[83] Further, the court claims that "*Casey* and *Cruzan* provide persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'"[84] From this comment and others by the court,[85] one may claim that the court did not import its understanding of authentic human existence but merely decided that the liberty interests stipulated in the Due Process Clause provide a legal, not comprehensive, norm supporting the autonomy of individuals to decide these matters. However, note that the court says that *Casey* and *Cruzan* provide "evidence" for their conclusion rather than saying they logically entail this conclusion. Further, recall that the Ninth Circuit clearly recognized the indeterminacy of this notion of liberty. Consequently, extending the rational continuum from *Planned*

81. *Id.* At 810. Although the Ninth Circuit recognized that a majority of states still have laws against assisting suicide, it further found that "[b]y the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the 37 states is it clear that there were statues prohibiting assisting suicide." *Id.* at 809.

82. *Id.* at 806-12.

83. *Id.* at 813. (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

84. *Id.* at 816.

85. In its conclusion the court emphasized that "[t]hose who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, *their religious convictions*, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths." *Id.* at 839.

Parenthood v. Casey[86] and *Cruzan v. Director, Missouri Dep't of Health*[87] to support a right to die requires that the court determine that it should be extended. In other words, the Ninth Circuit had to rely on an extra-legal norm (*i.e.*, a comprehensive or religious conviction about authentic human existence) to determine whether liberty ought to be extended to include the right to die. Moreover, the juxtaposition of the these opinions on the same fundamental liberties question helps disclose the necessity of relying on comprehensive convictions (the religious dimension of judicial decision making) both for courts that appear to embrace the religionist-disestablishment model (the Ninth Circuit) and for those that attempt to avoid the religionist-disestablishment model by adopting the disestablishment model (the Supreme Court). Thus, these opinions support the religionist-disestablishment model by revealing the logical necessity of relying on comprehensive or religious claims about authentic human existence in hard cases such as those involving the scope of liberty in the Due Process Clause of the Fourteenth Amendment.

3. The Justification of Judicial Decisions

Despite the necessary reliance on religious convictions in the process of deliberation, however, one might respond that these comprehensive convictions should appear in judicial opinions (religionist model) because the rule of law requires that judges set forth or make public all of the reasons for their decisions. Concealing these comprehensive or religious convictions about authentic human existence insincerely suggests (the Insincerity Objection) that the reasons given in the opinion were the only reasons for the judge's decision.[88] Furthermore, concealing these comprehensive convictions will cause citizens to loose faith in the judicial process and the rule of law will be undermined.

Although I can only begin to address the Insincerity Objection here, I will provisionally specify several reasons why the religionist-disestablishment model requires that comprehensive or religious convictions should remain implicit in judges opinions. First and foremost, the establishment clause appears to prohibit judges from explicitly articulating these religious or comprehensive convictions as

86. 505 U.S. 833 (1992) (reaffirming the "essential holding of Roe v. Wade").

87. 497 U.S. 261 (1990) (holding competent patients have a liberty interest in refusing unwanted medical treatment).

88. *See* PERRY, RELIGION IN POLITICS, *supra* note 3, at 104.

reasons for their decisions.[89] If this were not the case, subsequent litigants in analogous hard cases would have to challenge both the courts comprehensive conviction about authentic human existence and its analysis of legal principles in order to prevail. Further, although at the time of the first amendment it was assumed that almost everyone held comprehensive convictions that included a notion of a supreme being,[90] many now hold comprehensive convictions without a notion of a supreme being. In order to maintain the first amendment's intent of prohibiting the state's explicit recognition of a particular comprehensive conviction or claim (originally thought to include a notion of a supreme being), the first amendment should be interpreted to prohibit establishing all comprehensive claims including those without a notion of a supreme being. As a result, even though comprehensive convictions are necessarily relied on in the deliberation of hard cases, the religionist-disestablishment model recognizes that comprehensive convictions must only implicitly inform judicial opinions because the first amendment requires that the judges never explicitly endorse a comprehensive conviction.[91]

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89. For an argument that the establishment clause applies to the judicial branch of government, *see id.* at 10-12. Further, for a summary of Perry's general understanding of the establishment clause, which I am adopting here, *see supra* note 3. A fuller account of this interpretation of the establishment clause would argue that the establishment clause should be interpreted in light of the broad formal definition of religion specified above. This understanding of religion has been more or less adopted by the Supreme Court in the conscientious objector cases. *See, e.g.,* United States v. Seeger, 380 U.S. 163, 176 (1965) (recognizing the defendants' non-theistic convictions as functionally equivalent to theistic religious convictions because the person held "sincere and meaningful belief[s] which occupie[d] in the life of [their] posessor[s] a place parallel to that filled by the God of those admittedly qualifying for the exemption"); Welsh v. United States, 398 U.S. 333, 342-43 (1970) (extending the religious exclusion to moral or ethical views that were deeply held). Of course, this would require a unitary definition of religion to apply to both the free exercise and establishment clauses. *See* Everson v. Board of Education, 330 U.S. 1 (1947) (Rutledge, J., dissenting) (arguing that religion only appears once in the First Amendment in reference to the free exercise and establishment clause and that it should have one meaning not a broad one (free exercise) and a narrow one (establishment clause)). In addition, this would entail rejecting the secular purpose prong of the *Lemon* test or reinterpreting "secular" to mean noncomprehensive. *Cf.* Edwards v. Aguillard, 482 U.S. 578 (1987) (Scalia, J., dissenting) (contending that the secular purpose prong should be abandoned and argues that "discerning the subjective motivation of those enacting the statue is to be honest, almost always an impossible task").

90. SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 64 (1963) (quoting Benjamin Franklin's autobiography) (noting that even a rationalist like Benjamin Franklin believed that the "essentials of every religion" included "the existence of the Deity").

91. *Cf.* GAMWELL, *supra* note 4, at 205 Gamwell's interpretation of the meaning of the religion clauses of the First Amendment requires that:

In that case, the religionist-disestablishment model maintains that judges should justify their decisions based on noncomprehensive principles and on the lowest level principle possible in order to leave open the question of comprehensive justification.[92] As noted above, the Ninth Circuit in *Compassion in Dying* provides a good example of the religionist-disestablishment model because they were able to achieve this objective but still disclosed that they had to rely on a comprehensive conviction about authentic human existence. In addition, Greenawalt argues that keeping comprehensive convictions out of judicial opinions is not insincere because citizens do not "necessarily expect that public advocacy will reflect all bases of decision."[93] He argues that judges routinely conceal innovative steps in the law by suggesting in their opinions that their holding is already covered by a principle found in prior cases. Furthermore, in addressing politics in general, he argues that "*constructive* dialogue on deeper concerns is much more likely in other settings than the resolution of political issues" and that "there is little point in developing 'more complete' grounds, if the extra grounds developed are unlikely to enlighten others, may hinder constructive dialogue, and will probably cause feelings of exclusion and alienation."[94] If we apply these points to judicial decision making, the religionist-disestablishment model thus appreciates that legal opinions are not the

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> All religions are separated from the state in the sense that the state may not explicitly endorse any answer to the comprehensive question. At the same time, religion is essential to the body politic in the sense that political decisions should imply the valid comprehensive conviction. Politics is consistent in principle with a plurality of legitimate religions because they are united through democratic discourse, and adherents of all religions can consistently be democratically civil precisely because all religions claim to represent the valid understanding of human authenticity as such.

Id.

92. *Cf.* CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996). Sunstein argues that law is basically comprised of "incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them." *Id.* at 37. This allows for substantial disagreement on more general theoretical principles that attempt to explain and legitimize the law. Consequently, "people may agree on a *correct* outcome even though they do not have a theory to account for their judgments." *Id.* at 7.

93. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 11, at 163.

94. *Id.* at 164. *Cf.* Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533 (1998). Judge Gottschall argues that including religious sources when justifying decisions is "inappropriate and imprudent." *Id.* at 534. She further suggests that by relying on religious sources, a judge's decision would be perceived as "an idiosyncratic expression of [her] particular personality or background" rather than as a fair decision based on recognized sources of legal authority that both parties would accept." *Id.* at 534-35.

best place or a helpful place to engage in debate about the meaning of authentic human existence. Thus, if properly executed, the religionist-disestablishment model does not necessarily conceal (it can disclose) the reliance on comprehensive convictions, but at the same time, it prevents the establishment of a single comprehensive conviction as the basis for a decision and allows for the possibility for a plurality of comprehensive convictions to support the same conclusion.

Finally, requiring a less than comprehensive justification in a hard case leaves open the possibility that judges are sometimes warranted in relying on their best intuitions about how to achieve justice in these hard cases.[95] In other words, the religionist-disestablishment model does not require that judges become philosophers or theologians. This seems to confuse competence in theoretical reason for competence in practical reason. Ideally, the judge would be aware of the comprehensive conviction that, at least implicitly, informs her judgment but that will not allows be the case. Furthermore, even if she is aware of her comprehensive conviction, she might not be able to explicate fully the argument that relates it with her result. Moreover, judicial activity aims at doing justice not with providing a philosophy of justice. Thus, for all these reasons, the religionist-disestablishment model does not aim at concealment but at recognizing certain legal, practical, and epistemological limitations on the full disclosure of comprehensive convictions.

V. CONCLUSION

In conclusion, although there are logically four different models of how religious beliefs are related to judicial decision making, three of the models have proved to be inadequate to explain the logically necessary reliance on comprehensive or religious convictions in judicial deliberation in hard cases. Surprisingly, the *de facto* disestablishment model (represented by John Rawls), which maintains that religious convictions should not be relied on either in judicial deliberation or justification, has turned out to have serious problems that call into question its validity. This model that has tacitly informed most judges and lawyers understanding of judicial decision making and has caused a blindness to the religious dimension of judicial decision making. For

95. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Hutcheson argued that judges intuit or feel their way to the decision. *Id.* at 282. Once the judge has considered all the available material, the judge waits for the intuition, the hunch, which leads to the solution. *Id.* at 287.

example, the Supreme Court in *Washington v. Glucksberg* appeared to adopt this model, but further analysis of that case revealed that the court necessarily relied on a comprehensive conviction about authentic human existence to reach its conclusion that there is no fundamental liberty interest in assisted suicide. By contrast, the Ninth Circuit *en banc* opinion in this case appeared to adopt the religionist-disestablishment model. The religionist-disestablish model of judicial decision making maintains that judicial deliberation necessarily relies on a comprehensive or religious conviction about authentic human existence in hard cases but that the establishment clause of the first amendment requires that these comprehensive claims remain implicit in judicial opinions. The analysis of the Ninth Circuit opinion indicated how the court revealed that comprehensive convictions were required for their decision. To prevent the establishment of religion, however, the court did not explicitly adopt a particular comprehensive conviction. Accordingly, this model of judicial decision making allows for the possibility that a plurality of comprehensive convictions can justify the same result but on different comprehensive grounds. Furthermore, the religionist-disestablishment model maintains that the nature of judicial decision making as such in hard cases requires judges to rely on comprehensive or religious convictions. Thus, in hard cases, judges must resolve legal disputes according to their best comprehensive or religious judgment of what ought to be done even though judges should keep these comprehensive convictions implicit in the process of justification to prevent the establishment of a comprehensive conviction in violation of the establishment clause.

Moreover, this suggests that the *de facto* disestablishment of law is much less pervasive than it might seem. Further, given a certain reading of the establishment clause, this may be more adequately understood as a *de jure* disestablishment of religion from the justification of all cases and from judicial deliberation in easy cases. This leaves open a large role for religion in the deliberative process of hard cases. Assuming this argument has some merit, it suggests that religion should be viewed as a substantial resource for understanding the law and that the legal curriculum should be modified to reflect this.